

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs December 20, 2006

**THOMAS WAYNE OVERBAY v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Sullivan County**  
**No. C46,336     R. Jerry Beck, Judge**

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**No. E2006-00518-CCA-R3-PC - Filed February 1, 2007**

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The petitioner, Thomas Wayne Overbay, appeals from the Sullivan County Criminal Court's denial of his petition for post-conviction relief. Overbay is presently serving an effective forty-eight-year sentence in the Department of Correction for convictions of four counts of aggravated sexual battery and ten counts of rape of a child. In this post-conviction action, the petitioner claims that he was not afforded the effective assistance of counsel in the conviction proceedings. Upon appellate review, we conclude the lower court did not err in denying post-conviction relief and affirm its judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which DAVID H. WELLES and JAMES CURWOOD WITT, JR., JJ., joined.

Gene Gilmer Scott, Jr., Johnson City, Tennessee, for the appellant, Thomas Wayne Overbay.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and James Franklin Goodwin, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The petitioner's convictions arose from his sexual abuse of his then-girlfriend's five-year-old daughter. He was convicted at a jury trial, and his convictions were affirmed on direct appeal. State v. Thomas Wayne Overbay, No. E1999-00840-CCA-R3-CD, Sullivan County (Tenn. Crim. App. Sept. 5, 2000), app. denied (Tenn. Apr. 24, 2001). The petitioner filed a pro se petition for post-conviction relief on April 1, 2002. Counsel was appointed, and the petition was amended. The matter proceeded to hearing, at which the petitioner alleged that his trial counsel had been ineffective. The petitioner and the state presented evidence, and following the hearing, the trial court issued a written order in which it found all disputed factual issues in favor of the state and denied post-conviction relief. The petitioner then filed this appeal, in which he argues that his trial counsel was ineffective because counsel failed to explain the details of a plea offer, failed to explain the

release eligibility terms of the plea agreement versus those for the charged offenses, and gave the petitioner an erroneous estimate of his probability of being convicted.

The petitioner testified that trial counsel communicated an eight-year plea offer to him and told him that he would serve thirty percent of that sentence, which the petitioner recalled had been explained to him as “two years and some odd months and 24 days or something like that.” The petitioner said that trial counsel told him he was facing “25 years or something like that” for each count if convicted at trial but that he did not recall counsel telling him about the percentage of that sentence which he would be required to serve. The petitioner testified that he would have accepted the eight-year offer had he known that he would be required to serve a twenty-five year sentence without early release. The petitioner also testified that trial counsel told him that he had a seventy-five percent chance of acquittal based upon favorable evidence counsel anticipated from an expert witness.

The petitioner’s father testified that he was present when the plea offer was communicated and that counsel told the petitioner he would serve two and one-half years of the eight-year sentence that was on the table. The petitioner’s father also testified that trial counsel told the petitioner that he had a seventy-five percent chance of acquittal based upon the anticipated testimony of a physician that the victim had not been abused.

Trial counsel testified that he communicated the eight-year offer to the petitioner and his father. Counsel said the petitioner’s crimes were alleged to have taken place shortly after a change in the law which dramatically affected the percentage of service for sentences. Counsel said he told the petitioner repeatedly that one conviction on any of the fourteen counts would result in a sentence of at least fifteen years and as much as twenty-five years. Counsel informed the petitioner that such a sentence would be much more lengthy than the eight-year sentence offered. Counsel said he did not give the petitioner a prediction of the probability of acquittal and to do so would have been “preposterous.” He said this was not something he would ever do.

The trial court’s order dismissing the petition made detailed findings of fact. The trial court found that the petitioner’s attorney was credible and that the petitioner and his father were not.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court’s conclusions as to whether counsel’s performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel’s performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668,

687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong results in the denial of relief. Id. at 697, 104 S. Ct. at 2069.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See DeCoster, 487 F.2d at 1201.

In the present case, the trial court found that the petitioner failed to sustain his burden of proof on the factual premises for his claim of ineffective assistance of counsel. Upon appellate review, the record does not preponderate against the trial court's factual findings. Because the petitioner has not established a factual basis for relief, his claim of ineffective assistance of counsel must fail.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE